P T Karya Sumiden Indonesia v Oceanmasters Marine Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 27–35–08 OF 2013
NALLINI PATHMANATHAN J
9 OCTOBER 2015

Contract — Breach — Contract of carriage — Contract between shipper and non-vessel owning common carrier — Loss of copper rods carried in three consignments — Cargo released and/or delivered at port of delivery without due production or presentation of original house bills of lading — Whether common carrier acted in breach of contract and/or duty of care as carrier, and or bailee under terms of the bill of lading and/or for conversion — Whether shipper had locus to bring action — Whether action time barred — Whether there was conspiracy to injure shipper

The plaintiff ('KSI'), a shipper, claimed against the defendants, the non-vessel owning common carrier, in respect of the loss of copper rods carried in three consignments ('the cargo') from the Port of Tanjong Priok, Jakarta, Indonesia to the Port of Dammam, Saudi Arabia. The contract of carriage by sea between KSI as shipper and the second defendant ('Sapphire Line') was evidenced by three house bills of lading. The first defendant ('Oceanmasters') was at all times the undisclosed principal, a fact which KSI only discovered after the loss of its cargo. KSI's primary grievance is founded on the undisputed fact that its cargo was released and/or delivered at the port of delivery without due production or presentation of the original house bills of lading issued by Sapphire Line to it. In the normal course of events, the cargo would only have been released against production of the original bills of lading, ensuring that KSI had been paid the purchase price of the goods prior to release of the goods into the possession of the buyer. This was because KSI would only have released the original house bills of lading to the consignee or purchaser, Jawad and Malik Metal LLC ('JMM'), through its bank, upon receipt of the purchase price for the cargo. In the instant case, the goods were released at the port of delivery of Dammam, against 'switch' bills of lading, which were issued at the behest of JMM, the purchaser, by one Super Express Cargo ('Super Express'), the delivery agent, in the name and carrying the logo of North American Cargo, Inc. As a consequence of the use of these 'switch' bills of lading, delivery was effected directly to JMM's customer, one Al-Fanar Electrical Systems ('Al-Fanar') the ultimate receiver of the cargo, although JMM had still not paid the purchase price for the cargo.The value of the cargo was USD$5,914,010.40. KSI maintains vide its claim that the defendants acted in breach of contract and/or duty of care as carrier, and or bailee under the terms of the bill of lading and/or

for conversion in that they released or delivered KSI's cargo without due production and/or presentation of the original Sapphire house bills of lading. There was a further plea framed in the tort of conspiracy to injure. The issues that arose for the court's determination were whether KSI had locus to bring this action; whether KSI's action was time-barred under article III of the rule 6 of the Hague Rules; Whether Oceanmasters and/or Sapphire Line were in breach of contract as carrier and/or in breach of duty as bailee for reward, in releasing and/or allowing the cargo to be released without due production of the original Sapphire house bills of lading; whether loss and damage was suffered by KSI required determination; whether Oceanmasters, Sapphire Line and/or other parties conspired to injure KSI by obtaining the release of the cargo without due production of the original Sapphire house bills of lading.

Held, allowing claim:

(1) KSI did have locus standi to bring this action against Oceanmasters and Sapphire Line. KSI's cause of action against the defendants was founded in a breach of the contract of carriage of the cargo and bailment rather than in conversion. As such the issue of title to, or property in the cargo was not pivotal in determining whether there was in fact a breach of the contract of carriage or bailment in releasing the cargo without production of the original bills of lading. The intention of the parties as to the point in time when they mutually intended property in the cargo to pass was significant. A consideration of the correspondence between KSI and JMM as well as the terms of the long term agreement disclose that the cargo was sold on a 'Document against Payment' basis. Parties only intended title to pass upon payment of the purchase price. JMM never paid the purchase price and so title never passed to it. As title to the goods did not pass to JMM, it followed that the right of suit was not thus exclusively bestowed upon JMM, to the exclusion of KSI. KSI clearly had the requisite locus standi to sue Oceanmasters and Sapphire Line for breach of contract under the Sapphire Line house bills of lading (see paras 53–55 & 69).

(2) Clause 6G of the Sapphire Line house bills of lading provided that the carrier was discharged from liability within nine months from the date of delivery. However as this date was shorter than that provided by the Hague Rules, the nine month time limit was not enforceable. However, the defendants relied on the 12 month time limit imposed under article III rule 6 of the Hague Rules. Article III rule 6 of the Hague Rules did not apply to or encompass misdelivery as the application of the rules ceases upon 'discharge' of the cargo, as opposed to delivery. In short, delivery was outside the scope of the Hague Rules. As such, they could not apply to misdelivery of cargo. Instead the obligation to deliver was arguably under the terms of the bill of lading and not the Hague Rules. The time bar did not operate to preclude KSI's claim (see paras 71 & 83).

(3) It was not possible to determine with any degree of certainty, the precise dates when the three consignments were delivered into the care of Al-Fanar. This would mark the precise dates when time would begin to run. Time would not run from the date of arrival of the vessel at the Port of Dammam. The time bar could not possibly operate in relation to the 14th shipment, even if it were applicable, as the suit by KSI was commenced on 1 August 2013. Given the lack of certainty as to date of delivery, this comprises a further and alternative basis that the time bar under article III rule 6 of the Hague Rules did not come into effect to extinguish KSI's claim (see paras 91 & 94–95).

(4) A carrier is under a duty to deliver goods carried under a bill of lading only against the production of the original bill of lading. To deliver otherwise, either without the original bili of lading or against a 'switch' bill of lading would, prima facie amount to a breach of the contract of carriage and/or conversion. Conversely, the shipper to whom a bill of lading is issued has a contractual right to take delivery of the goods at the port of delivery on production of the relevant bill of lading. This right arises from the issuance of the bill of lading. The bill of lading is a straight bill of lading in that it was consigned specifically to JMM. The fact that it was a straight bill of lading meant that Oceanmasters and its agent, Sapphire Line were under a contractual obligation to deliver the goods at Dammam on production of the straight bill of lading. Not only were the three consignments not delivered against production of the original bills of lading, but pursuant to the provision of a second set of bills of lading for the same cargo or by the provision of 'switch' bills of lading (see paras 98, 102 & 105).

(5) The requisite element of an 'intention' to cause such injury was missing. This was borne out by Sapphire Line's lack of knowledge of the use of 'switch' bills. Neither was there any evidence to support the proposition that Oceanmasters had specifically collaborated with JMM to allow for JMM's fraudulent use of 'switch' bills without procuring surrender of the original bills of lading. There was insufficient evidence to establish that the release of the goods was performed in furtherance of any such agreement. KSI's cause of action premised on conspiracy to injure against the defendants was dismissed (see paras 143–144).

[Bahasa Malaysia summary

Plaintif ('KSI'), ejen pengangkutan kapal, telah menuntut terhadap defendan-defendan, pengangkutan umum milik pengangkutan yang bukan suatu kapal, berkenaan dengan kehilangan rod tembaga dibawa dalam tiga konsainan ('kargo') daripada Pelabuhan Tanjong Priok, Jakarta, Indonesia ke Pelabuhan Dammam, Saudi Arabia. Kontrak pengangkutan melalui laut antara KSI sebagai ejen pengangkutan kapal dan defendan kedua ('Sapphire Line') telah dibuktikan melalui tiga bil muatan dalaman. Defendan pertama

('Oceanmasters') adalah pada setiap masa prinsipal yang tidak didedahkan, satu fakta yang KSI hanya ditemui selepas kehilangan kargonya. Kilanan utama KSI berasaskan fakta yang tidak dipertikaikan bahawa kargonya telah dilepaskan dan/atau dihantar di pelabuhan penghantaran tanpa penghasilan atau penyampaian bil-bil muatan asal yang dikeluarkan oleh Sapphire Line kepadanya. Dalam perjalanan biasa peristiwa, kargo hanya akan dilepaskan berdasarkan pengeluaran bil-bil muatan yang asal, memastikan bahawa KSI telahpun dibayar harga belian barangan sebelum barangan itu dilepaskan kepada milikan pembeli. Ini adalah kerana KSI akan hanya melepaskan bil-bil muatan dalaman yang asal kepada penerima atau pembeli, Jawad dan Malik Metal LLC ('JMM'), melalui banknya, setelah menerima harga belian untuk kargo itu. Dalam kes ini, barangan itu telah dilepaskan di pelabuhan untuk penghantaran kepada Dammam, terhadap 'switch' bil-bil muatan, yang dikeluarkan atas perintah JMM, pembeli, oleh Super Express Cargo ('Super Express'), ejen penghantaran, atas nama dan membawa logo North American Cargo, Inc. Akibat penggunaan 'switch' bil-bil muatan tersebut, penghantaran itu dilaksanakan secara terus kepada pelanggan JMM, iaitu Al-Fanar Electrical Systems ('Al-Fanar') penerima utama kargo itu, meskipun JMM masih belum membayar harga belian untuk kargo itu. Nilai kargo itu adalah USD$5,914,010.40. KSI menegaskan melalui tuntutannya bahawa defendan-defendan bertindak melanggar kontrak dan/atau kewajipan berjaga-jaga sebagai penerima, dan/atau baili di bawah terma-terma bil muatan dan/atau untuk penukaran yang mana mereka melepaskan atau menghantar kargo KSI tanpa penghasilan dan/atau penyampaian bil-bil muatan dalaman Sapphire yang asal. Terdapat pli selanjutnya yang dibuat dalam tort berhubung konspirasi untuk menjejaskan. Isu-isu yang timbul untuk penentuan mahkamah di mana sama ada KSI mempunyai locus untuk memulakan tindakan ini; sama ada tindakan KSI telah luput had masa di bawah artikel III kaedah 6 Kaedah-Kaedah Hague; sama ada Oceanmasters dan/atau Sapphire Line telah melanggar kontrak sebagai penerima dan/atau melanggar kewajipan sebagai baili untuk ganjaran, melepaskan dan/atau membenarkan kargo itu dilepaskan tanpa penghasilan sewajarnya bil-bil muatan dalaman Sapphire yang asal; sama ada kerugian dan kerosakan yang dialami oleh KSI memerlukan penentuan; sama ada Oceanmasters, Sapphire Line dan/atau pihak-pihak lain berkonspirasi untuk menjejaskan KSI dengan memperoleh pelepasan kargo itu tanpa penyampaian bil-bil muatan dalaman Sapphire yang asal.

Diputuskan, membenarkan tuntutan:

(1) KSI memang mempunyai locus standi untuk memulakan tindakan terhadap Oceanmasters dan Sapphire Line. Kausa tindakan KSI terhadap defendan-defendan berasaskan pelanggaran kontrak pengangkutan kargo itu dan bailmen bukannya penukaran. Oleh itu isu hak milik kepada, atau harta dalam kargo itu bukan penting dalam menentukan

sama ada sememangnya terdapat pelanggaran kontrak pengangkutan atau bailmen dalam melepaskan kargo itu tanpa pengemukaan bil-bil muatan yang asal. Niat pihak-pihak pada masa itu apabila mereka mempunyai niat bersama ke atas harta dalam kargo itu untuk dipindah adalah penting. Balasan untuk surat-menyurat antara KSI dan JMM dan juga terma-terma perjanjian jangka panjang menunjukkan bahawa kargo itu telah dijual atas dasar 'Document against Payment'. Pihak-pihak hanya berniat hakmilik dipindah setelah pembayaran harga belian. JMM tidak membayar harga belian itu dan hakmilik itu tidak pernah dipindah kepadanya. Berhubung hak milik kepada barangan tidak dipindah kepada JMM, ia diikuti bahawa hak guaman tidak secara eksklusif diberikan kepadanya JMM, dengan mengecualikan KSI. KSI jelas mempunyai locus standi yang diperlukan untuk menyaman Oceanmasters dan Sapphire Line kerana melanggar kontrak di bawah bil-bil muatan dalaman Sapphire Line (lihat perenggan 53–55 & 69).

(2) Fasal 6G bil-bil muatan dalaman Sapphire Line memperuntukkan bahawa pengangkut itu bebas daripada liabiliti dalam tempoh sembilan bulan dari tarikh penghantaran. Walau bagaimanapun oleh kerana tarikh ini lebih pendek daripada yang diperuntukkan oleh Kaedah-Kaedah Hague, hada masa sembilan bulan itu tidak boleh dikuatkuasakan. Namun begitu, defendan-defendan bergantung kepada had masa dua bulan yang dikenakan di bawah artikel III kaedah 6 Kaedah-Kaedah Hague itu. Artikel III kaedah 6 Kaedah-Kaedah Hague tidak terpakai kepada atau merangkumi salah serahan kerana pemakaian kaedah-kaedah itu terhenti apabila kargo itu 'discharge', berbanding dengan penghantaran. Pendek kata, penghantaran itu di luar skop Kaedah-Kaedah Hague. Oleh itu, ia tidak terpakai kepada salah serahan kargo itu. Sebaliknya kewajipan untuk menghantar boleh dikatakan di bawah bil muatan itu dan bukan Kaedah-Kaedah Hague. Had masa tidak beroperasi untuk mengecualikan tuntutan KSI (lihat perenggan 71–83).

(3) Ia tidak mungkin untuk menentukan dengan apa-apa tahap kepastian, tarikh-tarikh yang tepat apabila ketiga-tiga konsainan itu diserahkan dalam jagaan Al-Fanar. Ini akan menandakan tarikh-tarikh tepat bila masa bermula. Masa tidak akan bermula dari tarikh ketibaan kapal itu di Pelabuhan Dammam. Had masa tidak mungkin beroperasi berkenaan penghantaran ke-14, meskipun ia boleh terpakai, kerana guaman oleh KSI telah dimulakan pada 1 Ogos 2013. Berdasarkan kekurangan kepastian berhubung tarikh penghantaran, ini merangkumi asas alternative dan selanjutnya bahawa had masa di bawah artikel III Kaedah 6 Kaedah-Kaedah Hague tidak berkuatkuasa untuk membatalkan tuntutan KSI (lihat perenggan 91 & 94–95).

(4) Suatu pengangkut adalah di bawah kewajipan untuk menghantar

barangan yang dibawa di bawah bil muatan hanya berdasarkan pengeluaran bil muatan yang asal. Untuk menyerahkan sebaliknya, sama ada tanpa bil muatan yang asal atau terhadap 'switch' bil muatan itu akan, secara prima facie merupakan satu pelanggaran kontrak pengangkutan dan/atau penukaran. Sebaliknya, ejen pengangkutan kapal yang mana bil muatan itu dikeluarkan mempunyai hak kontraktual untuk mengambil penghantaran barangan itu di pelabuhan penghantaran atas pengeluaran bil muatan yang relevan. Hak ini timbul daripada pengeluaran bil muatan. Bil muatan merupakan bil muatan biasa di mana ia telah diserahkan khusus kepada JMM. Fakta bahawa ia adalah bil muatan yang biasa bermaksud Oceanmasters dan ejennya, Sapphire Line berada di bawah tanggungjawab kontraktual untuk menghantar barangan di Dammam dengan pengeluaran bil muatan yang biasa itu. Bukan hanya ketiga-tiga konsainan tidak dihantar ke atas pengeluaran bil muatan yang asal itu, tetapi menurut peruntukan set kedua bil muatan untuk kargo yang sama oleh peruntukan 'switch' bil muatan itu (lihat perenggan 98, 102 & 105).

(5) Elemen yang diperlukan untuk 'intention' bagi mengakibatkan kecederaan tiada. Ini disebabkan oleh kurang pengetahuan oleh Sapphire Line tentang penggunaan 'switch' bil tersebut. Tiada apa-apa keterangan untuk menyokong cadangan bahawa Oceanmasters secara khusus telah bekerjasama dengan JMM untuk membenarkan penggunaan secara fraud JMM untuk 'switch' bil tersebut tanpa mendapatkan serahan bil-bil muatan yang asal itu. Keterangan tidak mencukupi untuk membuktikan bahawa pelepasan barangan itu telah dilaksanakan berikutan apa-apa perjanjian sebegitu. Kausa tindakan KSI berasaskan konspirasi untuk menjejaskan defendan-defendan telah ditolak (lihat perenggan 143–144).]

Notes

For cases on breach in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3443–3865.

Cases referred to

APL Co Pte Ltd v Voss Peer [2002] 4 SLR 481, CA (refd)

Anglo Irish Beef Processors International v Minister for Agriculture, Food and Forestry: C-200/94 [1997] 1 Lloyd's Rep 207, SC (refd)

Aries Tanker Corpn v Total Transport Ltd, The Aries [1977] 1 WLR 185, HL (refd)

BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties) [2003] 3 SLR 611, HC (refd)

Barclays Bank Ltd v Customs and Excise Comrs [1963] 1 Lloyd's Rep 81, QBD (refd)

Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd, The Berge Sisar [1999] QB 863, CA (refd)
Chellaram (P S) & Co Ltd v China Ocean Shipping Co, The Zhi Jiang Kou [1991] 1 Lloyd's Rep 493, CA (refd)
Cia Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos [1989] 2 Lloyd's Rep 63, HC (refd)
Cia Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos [1990] 1 Lloyd's Rep 310, CA (refd)
Computronics International v Piff Shipping Limited [1997] 2 HKC 53, CA (refd)
Elder Dempster Lines v Ishag, The Lycaon [1983] 2 Lloyd's Rep 548, QBD (refd)
Frebold and Sturznickel (t/a Panda OHG) v Circle Products Ltd [1970] 1 Lloyd's Rep 499, CA (refd)
National Jaya (Pte) Ltd v Hong Tat Marine Shipping Pte Ltd [1979] 2 MLJ 6; [1978-1979] SLR 416 (refd)
Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd [1964] 1 MLJ 443, FC (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393; [2010] 9 CLJ 389, CA (refd)
Samsung Corp v Devon Industries Sdn Bhd [1996] 1 SLR 469, HC (refd)
Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] 1 MLJ 200, PC (refd)
MacWilliam (JI) Co Inc v Mediterranean Shipping Co SA, The Rafaela S [2005] 2 AC 423, HL (refd)
The 'Taveechai Marine'; Owners of cargo lately laden on board the ship or vessel 'Taveechai Marine' v Owners of and other persons interested in the ship or vessel 'Taveechai Marine' [1995] 1 MLJ 413, HC (refd)
The 'Cherry' and Others [2003] 1 SLR 471, CA (refd)
Vallejo v Wheeler (1774) 1 Cowp 143, KB (refd)
Wily Products Co Ltd v Hecny Shipping [1995] 3 HKC 47, CA (refd)

Legislation referred to

Bills of Lading Act 1855 [UK] ss 1, 2
Civil Law Act 1956 s 5
Contracts Act 1950 ss 179, 184, 186
Sale of Goods Act 1957 ss 19, 19(2), 25, 25(3)
Sale of Goods Act 1979 [UK] s 19

Sitpah Seivaratnam (Siti Rahaya bt Mohd Mumazaini with her) (Tommy Thomas) for the plaintiff.
Arun Krishnalingam (Sativale Mathew Arun) for the first defendant.
Jeremy Mark a/l Joseph Jayaraj S (Vinodhini Benjamin Samuel with hime) (Joseph & Partners Suite) for the second defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff in this action, PT Karya Sumiden Indonesia ('KSI') makes claim, as shipper, against the two defendants, Oceanmasters Marine Services Sdn Bhd ('Oceanmasters') and its agent, Sapphire Line Private Ltd ('Sapphire Line'), effectively the non-vessel owning common carrier, in respect of the loss of copper rods carried in three consignments ('the cargo') from the Port of Tanjong Priok, Jakarta, Indonesia to the Port of Dammam, Saudi Arabia.

[2] The contract of carriage by sea between KSI as shipper and the second defendant, Sapphire Line as carrier, is evidenced by three house bills of lading issued by Sapphire Line. Oceanmasters was at all times the undisclosed principal, a fact which KSI only discovered after the loss of its cargo.

[3] KSI's primary grievance is founded on the undisputed fact that its cargo was released and/or delivered at the port of delivery without due production or presentation of the original house bills of lading issued by Sapphire Line to it. In the normal course of events, the cargo would only have been released against production of the original bills of lading, thereby ensuring that KSI had been paid the purchase price of the goods prior to release of the goods into the possession of the buyer. This is because KSI would only have released the original house bills of lading to the consignee or purchaser, Jawad and Malik Metal LLC ('JMM'), through its bank, upon receipt of the purchase price for the cargo.

[4] However in the instant case, it is not in dispute that the goods were released at the port of delivery of Dammam, against 'switch' bilis of lading, which were issued at the behest of JMM, the purchaser, by one Super Express Cargo ('Super Express'), the delivery agent, in the name and carrying the logo of North American Cargo Inc.

[5] As a consequence of the use of these 'switch' bills of lading, delivery was effected directly to JMM's customer, one Al-Fanar Electrical Systems ('Al-Fanar') the ultimate receiver of the cargo, although JMM had still not paid the purchase price for the cargo.

[6] It is not disputed that the value of the cargo is USD$5,914,010.40.

[7] As such, KSI maintains vide its claim that the defendants acted in breach of contract and/or duty of care as carrier, and or bailee under the terms of the bill of lading and/or for conversion in that they released or delivered KSI's cargo without due production and/or presentation of the original Sapphire house

bills of lading. There is a further plea framed in the tort of conspiracy to injure.

[8] It is necessary to comprehend the nature of the relationship between the defendants. Sapphire Line, the issuer of the original house bills of lading, is the agent of Oceanmasters, and at all times acted under the direction of the latter. This is evidenced by an agency agreement dated 2 February 2011 between Oceanmasters and Sapphire Line. In other words, the relationship between Oceanmasters and Sapphire Line is one of principal and agent respectively.

[9] KSI therefore brings its claim against Oceanmasters and Sapphire Line as principal and agent respectively.

[10] (Oceanmasters is in the business of freight agency while Sapphire Line carries on business as a carrier, freight forwarder and shipping agent.)

[11] By way of defence, Oceanmasters maintains that it cannot be held responsible for JMM's act of procuring the issuance of 'switch' bills of lading from Super Express under the name and carrying the logo of North American Cargo Inc. JMM thereafter instructed Oceanmasters to authorise release/delivery against those 'switch' bills of lading, and Oceanmasters duly complied.

[12] In this context, Oceanmasters points to the fact that it was appointed by JMM as JMM's agent, to arrange for the shipment and carriage of the cargo purchased by JMM from KSI from the Port of Tanjung Priok to the Port of Dammam. Oceanmasters maintains that it did not know, and could not have known, that JMM had failed to procure the original bills of lading by paying the purchase price and then surrendering the original bills of lading, prior to issuance of the 'switch' bills of lading. Oceanmasters maintained that it simply proceeded to act on the instructions of JMM to whom it was primarily answerable. Oceanmasters points to the fact that the contract between JMM and KSI is on FOB terms whereby it was JMM that arranged for the transport of the cargo from the port of loading and was therefore responsible for payment of freight. To this end, Oceanmasters maintains that it is bound to obey the directions of JMM, who appointed it.

[13] Sapphire Line maintains that it was unaware that 'switch' bills of lading were involved in the transaction. It also maintains that KSI never advised Sapphire Line that it had not been paid by JMM for the three consignments of copper rods. Neither was it asked to withhold delivery or return the three shipments by reason of non-payment by JMM.

[14] Both Oceanmasters and Sapphire Line maintain that the entire fault and responsibility for the unlawful release of the cargo to Al-Fanar using the

'switch' bills of lading issued by one North American Lines, was orchestrated solely by JMM. They deny any knowing involvement in the scheme resulting in the wrongful release of the cargo against 'switch' bills of lading, rather than against presentation of the original bills of lading. As such, they deny liability for the loss and damage suffered by KSI. The defendants categorically deny the allegation of conspiracy.

[15] Additionally they raise by way of defence, limitation under article III rule 6 of the Hague Rules as well as the contention that KSI lacks locus standi to bring this suit as it does not enjoy title to the cargo.

[16] It should be noted that in relation to the breach of the primary sale and purchase contract by JMM in failing to pay for the three consignments, the dispute is the subject matter of an arbitration in Saudi Arabia. KSI has not recovered any part of its loss from JMM to date.

SALIENT BACKGROUND FACTS

[17] The salient background facts have been comprehensively set out in the submissions of KSI, Oceanmasters and Sapphire Line. Accordingly the relevant chronology of events below is adopted collectively from their submissions.

[18] KSI entered into a sale and purchase transaction with a Dubai company, JMM for the sale of 100 metric tonnes of copper rods on FOB Jakarta Port' and 'Document against Payment' trade terms. This first sale was treated as a trial transaction. Under these terms, KSI was to deliver the copper rods to JMM or its agent at the port of loading, whereupon JMM as buyer was responsible to arrange for, and bear the costs of transportation from the port of loading in Tanjong Priok, Indonesia to the port of destination. Payment for the cargo by JMM was to be effected through KSI's bank, which held, inter alia, the original bills of lading to the cargo, and which would be given to JMM upon receipt of the purchase price. This would enable JMM to take delivery of the cargo against production of the original bills of lading.

[19] For this initial transaction, JMM nominated an Indonesian company called PT Pratama Indo International Indonesia ('Pratama') as its shipping agent to organise the transportation from the port of loading to the port of destination. The contract of carriage of this cargo was evidenced, inter alia, by a bill of lading issued by Pratama in the name and under the logo of Sapphire Line.

[20] This initial transaction was undertaken with a view to ascertaining whether KSI and JMM could enter into a long term relationship. JMM rejected any suggestion that payment for the cargo should be made upfront.

However in an exchange of emails, JMM's representative assured KSI that the issuance of biils of lading would safeguard KSI as an unpaid seller, in that JMM could not procure release of the cargo without production of the original bills of lading. In short, the original bills of lading comprised security whereby KSI could ensure that its goods would only be released against production of the original bills of lading. This initial transaction proved to be successful.

[21] As a consequence, KSI and JMM entered into a 'Sales agreement for 8 mm copper wire rods 2012' and a 'Master agreement dated December 2011' which comprised a long term agreement for the sale of copper wire rods. Under this long-term agreement, KSI agreed to sell to JMM between 300 to 500 metric tonnes of copper wire rods per month between January to December 2012. The terms were similar to the initial sale transaction, namely the terms were 'FOB Jakarta Pod' and 'Document against Payment' basis.

[22] As these contracts were on an FOB basis, the buyer, JMM, bore the responsibility to nominate the ship for transportation. JMM appointed Oceanmasters to arrange for the shipment of these consignments from Tanjong Priok to the Port of Dammam. The appointment of Oceanmasters was not known to KSI.

[23] Oceanmasters in turn appointed Sapphire Line as its agent, and this is evidenced by an agency agreement dated 2 February 2012 between Oceanmasters and Sapphire Line.

[24] There were 16 consignments in total. Three of these 16 consignments comprise the subject matter of this dispute, namely the 11th, 14th and 15th shipments, which were consigned pursuant to purchase orders dated 29 April 2012 and 24th May 2012 respectively. The 11th and 14th shipment comprised 260 metric tonnes while the 15th shipment comprised 240 metric tonnes.

[25] As with the initial transaction, Sapphire Line house bills of lading were issued by Pratama on behalf of Sapphire Line to KSI as shipper. They were issued upon delivery of the cargo into Pratama's custody at Tanjong Priok. These bills of lading evidenced the contract of carriage between KSI as the shipper and Sapphire Line as the carrier in respect of the carriage of the cargo from the Port of Tanjong Priok to the Port of Dammam under the name of Sapphire Line, on behalf of Oceanmasters. The details of these bills of lading are as follows:

Shipments	Bill of Lading No	Date
11th shipment	JKTDMM-1205010	17 May 2012
14th shipment	JKTDMM-1206013	11 June 2012
15th shipment	JKTDMM-1206014	18 June 2012

[26] KSI was named as the 'shipper' in these bills of lading, JMM as the 'consignee' and Super Express as the agent. Oceanmasters instructed Sapphire Line to name Super Express as the agents on the house bills of lading. Super Express was effectively the delivery agent. Additionally Oceanmasters also had their agents shipping and logistics at Dammam to handle the discharge. Shipping and logistics were also effectively agent for Sapphire Line as the flow of communication was always through Oceanmasters.

[27] Turning to the primary contract of sale and purchase between KSI as seller and JMM as buyer, the mode of transaction was 'Document against Payment' as per the initial transaction. Under the terms of the long term contract, the original Sapphire Line house bills of lading together with the other relevant shipping documents were submitted by KSI to its bank between May to June 2012 for collection or exchange against payment by JMM of the respective price of each consignment.

[28] The three consignments in dispute remained unpaid. KSI demanded payment of the purchase price of the 11th, 14th and 15th shipments from JMM between the end of June and the end of July but to no avail.

[29] In the interim however, the carriage of the cargo to Dammam continued. At least three pre-alerts were sent by Pratama on 21 May 2012, 12 June 2012 and 19 June 2012 to Oceanmasters advising that the cargo was arriving and containing shipment details consistent with the details on the Sapphire Line house bills of lading.

[30] JMM had not paid KSI (or its bankers) for the purchase price of the consignments, so the original bills of lading remained with KSI's bankers. At this time, JMM procured 'switch' bills of lading under the name of North America Cargo Inc issued by Super Express. JMM then instructed Oceanmasters that delivery was to be effected through the use of these 'switch' bills of lading rather than the original Sapphire Line house bills of lading.

[31] Oceanmasters acted on the instructions of JMM, as it was JMM's agent for the carriage and shipment of the cargo from the Port of Tanjung Priok to the Port of Dammam. Oceanmasters maintained that it only agreed to delivery against the 'switch' bills of lading as it assumed that the original bill of lading had in fact been surrendered to Super Express, and only then replaced with the 'switch' bills of lading. In so far as the three disputed consignments were concerned, Oceanmasters maintained that at all times it was not aware that Super Express did not in fact obtain surrender of the original Sapphire Line house bills of lading before releasing the 'switch' bills of lading. This had in fact been done in respect of all the previous shipments. Oceanmasters contended that it only became aware that KSI was still holding the original Sapphire Line

house bilis of lading for the three disputed shipments when KSI enquired of Pratama as to the whereabouts of these shipments.

[32] In so far as Sapphire Line and Pratama were concerned, they maintained that they were never told by Oceanmasters that a 'switch' bill of lading was involved in the delivery of the goods. To this end they remained unaware as to who had altered the pre-alert details to the delivery agents, Super Express and Shipping and Logistics.

[33] The cargo was duly discharged at the Port of Dammam, Saudi Arabia. By use of the 'switch' bills of lading, JMM's customer, one Al-Fanar procured release of the cargo into its possession at Dammam. The details of these 'switch' bills of lading are as follows:

Shipments	Date	'switch' bills of lading
11th shipment	17 May 2012	DXB/DAM/7644
14th shipment	11 June 2012	DXB/DAM/7658
15th shipment	18 June 2012	DXB/DAM/7661

[34] The issuance of the 'switch' bills of lading was orchestrated by JMM. The cargo represented by these consignments ought not to have been released save and except upon production of the original bills of lading. The use of 'switch' bills of lading should only have been possible upon the surrender of the original Sapphire Line house bills of lading to JMM and then Super Express prior to issuance of such 'switch' bills of lading. Such surrender would only have been possible if JMM had obtained possession of the Sapphire Line original house bills of lading by paying for the purchase price of the cargo to KSI's bankers. In this case, as JMM had procured the issuance of these 'switch' bills without surrender of the Sapphire Line house bills of lading, delivery and possession of the cargo was wrongfully procured against presentation of these 'switch' bills of lading rather than against presentation of the original bills of lading.

[35] On 2 August 2012, KSI was informed at a meeting with JMM in Dubai that the cargo had been released at Dammam without production of the original Sapphire Line house bills of lading. This was confirmed by KSI's bankers on 9 August 2012 who advised that the original Sapphire Line house bills of lading remained uncollected.

[36] KSI learnt for the first time of Oceanmaster's involvement in the shipment as the principal of Sapphire Line, at a meeting at its offices on 13 September 2012. In attendance were representatives of KSI, Pratama and Oceanmasters. it was also at this meeting that KSI learnt that the cargo was released at Dammam against 'switch' bills of lading to JMM's customer, Al

Fanar. Oceanmasters maintained that the 'switch' bills of lading were issued by JMM's agent, Super Express, at its behest, unknown to Oceanmasters and Sapphire Line.

[37] On 4 October 2012, KSI sent a letter of demand to Sapphire Line and Pratama demanding, inter alia, the return of the cargo or the payment of the purchase price of the cargo. They responded through their solicitors vide letter dated 5 October 2012, denying liability and maintaining that at all material times they were acting as agent for Oceanmasters.

[38] On 19 December 2012 KSI applied for an order for pre-action discovery against Oceanmasters and Sapphire Line in the Singapore High Court, it was discovered through these proceedings that a letter of indemnity dated 26 September 2012 had been issued by JMM to Oceanmasters and Sapphire Line. By the terms of this letter of indemnity, JMM expressly agreed, inter alia, to indemnify Oceanmasters and Sapphire Line against all claims and liability in relation to the wrongful release of the cargo at Dammam. It is evident that this letter of indemnity was issued by JMM after the wrongful release of the goods, and not at the time of the release of the goods, in order to procure such release.

THE TRIAL

[39] The trial of this matter took place over three days from 7 July–9 July 2014. Seven volumes of common bundles of documents were introduced in evidence and admitted as Part B documents. Four witnesses testified at trial:

For KSI:

(a) Akihiro Nomura ('PW1') who testified in Japanese through an interpreter;

(b) Tetsuya Tohno ('PW2')

For Oceanmasters:

(c) Raja Selvakumar Pon Ganesh ('D1W1')

For Sapphire Line:

(d) Haslinda Sulaiman ('D2W2')

[40] Having considered the entirety of the evidence and the meticulous submissions of learned counsel for the plaintiff and the defendants, the following issues arise for determination by this court:

(a) does KSI have locus to bring this action?

(b) is KSI's action time barred under article III rule 6 of the Hague Rules of

the terms of the Sapphire house bill of lading?

(c) whether Oceanmasters and/or Sapphire Line are in breach of contract as carrier and/or in breach of duty as bailee for reward, in releasing and/or allowing the cargo to be released without due production of the original Sapphire house bills of lading.

If the answer to these issues are yes, then the consequential issue of whether loss and damage was suffered by KSI requires determination.

(d) whether Oceanmasters, Sapphire Line, JMM and/or Super Express and/or other parties conspired to injure KSI by obtaining the release of the cargo without due production of the original Sapphire house bills of lading.

Each of these issues will be considered in turn.

Issue 1: Does KSI have locus to bring this action?

[41] Learned counsel for Oceanmasters submits that KSI has no locus standi to bring this action on the grounds that the primary sale contract between KSI and JMM is on FOB terms, meaning that title to the cargo passed together with the risk to JMM upon the cargo crossing the ship's rail at the port of loading in Tanjung Priok, Jakarta. The cargo was consigned in the Sapphire Line house bills of lading to JMM, and pursuant to s 1 of the Bills of Lading Act 1855, the rights of suit passed to JMM. As such, it is submitted that KSI has no locus standi to bring this action.

[42] The reasoning or rationale behind this submission may be summarised as follows:

(a) The sales contracts between KSI and JMM for each of the consignments are on FOB terms. This is undisputed. Clause 3 of the master agreement dated 30 December 2011 between KSI and JMM provides that:

3. Title and Risk of Loss

Unless otherwise agreed in writing title to Products shall pass from KSI to JM Metal at the same time risk of loss of the Products is passed in accordance with the Delivery terms described in Sales Agreement.

Delivery terms used in Sales Agreement shall have meanings stipulated in the INCOTERMS 2000 published by the International Chamber of Commerce, unless the provisions thereof or of this Agreement otherwise require. (Emphasis added.)

[43] The buyer, JMM bears all risk of loss or damage to the cargo once the cargo has passed the ship's rail at the named port of shipment. This is provided in cl B5 of Free on Board Incoterms 2000. The position is similar at common law (see *Frebold and Sturznickel (t/a Panda OHG) v Circle Products Ltd* [1970] 1 Lloyd's Rep 499):

> ... *The essence of an fob contract is that the goods are to be shipped free on board a ship (ie at the seller's expense) and consigned to the buyer or his agent.* On shipment the goods are appropriated to the contract and the seller cannot thereafter rightfully withdraw or otherwise dispose of the goods. *The property in them passes to the buyer*, who is responsible for the freight and the goods are at the buyer's risk. (Emphasis added.)

[44] In this context, reliance is placed on s 1 of the Bills of Lading Act 1855 which states as follows:

> *Every consignee of poods named in a bill of lading*, and every endorsee of a bill of lading *to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment* or endorsement*, shall have transferred and vested in him, all rights of suit*, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. (Emphasis added.)

[45] By reason of the foregoing, Oceanmasters submits that the risk in the cargo passed to JMM upon the cargo crossing the ship's rail at the port of loading in Tanjung Priok, Jakarta. As JMM was named as the consignee in the Sapphire Line house bills of lading, property in the goods passed or was consigned to JMM such that all rights of suit passed to JMM. In short, it is contended that KSI no longer had any locus standi to sue after the cargo was deposited on board the vessel at the loading port.

KSI's submission on locus standi

[46] KSI meets this challenge to its locus standi by asserting that its primary claim against the defendants is for breach of contract and bailment. The contract of carriage and bailment is evidenced by the Sapphire Line house bills of lading which name KSI as a party and Sapphire Line as the other party (as agent for Oceanmasters). KSI's grievance or complaint, in the context of this case, is for breach of the contract of carriage and bailment in that the cargo was released, not against the production of the original house bills of lading, but against 'switch' bills.

[47] In this context, KSI submits that title to, or property in the cargo is irrelevant to these causes of action found in contract and in bailment. In any event, they point to the evidence of the witnesses for Sapphire Line and Oceanmasters who both admitted a continuing obligation to KSI to deliver the cargo only upon production of the original bills of lading. In short, KSI

contends, firstly, that while the passing of title or property may be relevant in a claim formed in the tort of conversion, it is not significant or relevant in the context of KSI's claim here which is premised on breach of contract and bailment.

[48] Secondly, KSI maintains that upon a construction of the correspondence as well as the long term agreement between KSI and JMM it is evident that the cargo was sold on a 'Document against Payment' basis. As such it is submitted for KSI that the parties mutually intended for the property in the cargo to pass from KSI to JMM only upon payment of the purchase price.

[49] It is further pointed out that the parties, JMM and KSI had mutually agreed through their correspondence that JMM was to have no rights and title to the cargo until the price was paid, when the Sapphire Line house bills of lading would then pass through KSI's bankers to JMM.

[50] Although cl 3 of the master agreement stipulates for title to pass in accordance with delivery terms, it preserves a contrary position if agreed in writing. And KSI points to just such a contrary position which is evidenced in writing in that the parties agreed to a 'Document against Payment' mode of payment whereby document of title to the cargo would only be released to JMM upon its having paid in full for the cargo.

[51] Finally, KSI relies on s 19 of the Sale of Goods Act 1957 which provides for property to pass as intended by the parties having regard to the conduct of the parties and in the circumstances of the case. In the instant case, it is submitted that the factual matrix supports the position that property in the goods was only to pass to JMM upon payment of the purchase price of the cargo.

[52] Section 25(3) of the Sale of Goods Act 1957 is also relevant. It expressly provides that where a bill of exchange is forwarded along with the bill of lading as was the case here, and the bill of exchange is dishonored, property in the cargo does not pass to the buyer, even where the bill of lading is wrongfully retained by the buyer.

Conclusion of the court on whether KSI has locus standi to bring this action

[53] Having considered the competing submissions carefully, I am satisfied that KSI does have locus standi to bring this action against Oceanmasters and Sapphire Line. I concur with the rationale set forth by learned counsel for KSI as reflecting the correct position in law. Accordingly the reasons for my conclusion are as follows.

[54] KSI's cause of action against the defendants is founded in a breach of the contract of carriage of the cargo and bailment rather than in conversion. As such the issue of title to, or property in the cargo is not pivotal in determining whether there was in fact a breach of the contract of carriage or bailment in releasing the cargo without production of the original bills of lading.

[55] In any event, a consideration of the entirety of the factual matrix points to the property in the goods not having passed to JMM, either upon loading in Jakarta or upon discharge in Dammam, Saudi Arabia, as the purchase price for the cargo was never paid to KSI. In this context, the intention of the parties as to the point in time when they mutually intended property in the cargo to pass is significant.

[56] A consideration of the correspondence between KSI and JMM as well as the terms of the long term agreement disclose that the cargo was sold on a 'Document against Payment' basis. In an email from one Bassam of JMM to Akihiro Nomura (PW1), JMM effectively confirmed as follows:

> Our financial position is very good. *Please remember when you give the material to the shipping company, they will give you the B/L. Without the B/L, we cannot take the material. Once we pay through our bank, they will give us the original documents (including the B/L)*. This is the only way that we do business ... (Emphasis added.)

[57] By so asserting, JMM clearly evinced an intention for the property in the cargo not to pass to it unless and until KSI had been paid in full for the cargo. The house bills of lading provided the security or safeguard to ensure that the cargo would not be released without full payment by JMM. In the ordinary course of business, as the original Sapphire Line house bills of lading remained with KSI's bankers, indicating that the purchase price for the cargo remained unpaid, the cargo ought not to have been released into the custody of JMM or its assignees or indorsees. These were the terms expressly confirmed by JMM. Given this factual matrix, it would be untenable to conclude that the property or title to the cargo passed to JMM at the port of loading in Jakarta by reason solely of the FOB terms.

[58] Further and in any event, the witnesses for Sapphire Line and Oceanmasters both agreed that the Sapphire Line house bills of lading represented title to the cargo. Both D1W1 and D2W2 agreed that the bill of lading was issued upon receipt of, and in exchange for the goods. To that extent, they both expressly agreed that the original house bills of lading represented the cargo or title to the cargo.

[59] As KSI through its bankers never released the original house bills of lading to JMM, it follows therefore that the title to the cargo similarly did not pass to JMM.

[60] The entirety of the evidence relating to the mode of execution of the sales transaction suggests that both JMM and KSI mutually agreed that JMM was to have no rights and title to the cargo until the price was paid. Again, this is evident from the fact that the bills of lading would be held by KSI's bankers until full payment of the purchase price was received, whereupon the original bills of lading would be released to JMM, along with title to the cargo. KSI's witnesses and the email exchange from Bassam of JMM confirm this contractual arrangement. In this context, it is relevant that although cl 3 of the master agreement stipulates for title to pass in accordance with delivery terms, it expressly preserves a contrary position in writing. I would concur with learned counsel for KSI that the sales agreement provides for just such a contrary position as it stipulates expressly for a 'Document against Payment' mode to be adopted by the parties. This clearly envisages that document of title to the cargo would only pass upon payment being made to the seller by the buyer.

[61] To ensure that such a 'Document against Payment' system was viable and effective, KSI retained all rights over the Sapphire Line house bills of lading, which represent title to the cargo until such time as KSI was paid. It therefore follows that property in the cargo remained with KSI until such time as payment was made.

[62] What then is to be made of the FOB terms agreed upon by the parties in the master agreement (cl 3) and the INCOTERMS 2000? These terms must be construed within the entire factual matrix and circumstances of the case with a view to ascertaining objectively the true intention of the parties as to when they mutually intended property to pass. In *Samsung Corp v Devon Industries Sdn Bhd* [1996] 1 SLR 469, a decision of the High Court of Singapore, GP Selvam J held as follows:

> Under the true fob contract, property iike risk passes to the buyer upon shipment. *But this is not an inviolable rule. The question of passing property must be decided not merely by reference to the letters 'fob' in the contract but by the true intention of the parties, ascertained from the terms of the contract in the context of the commercial realities of the sale and purchase …*
>
> *My construction of the contract between the parties is that on the facts of the case the parties did not intend that the defendants would acquire title to the goods or the documents before they made payment in return for the documents …* (Emphasis added.)

[63] Similarly in like manner, in the instant case the facts taken in their entirety suggest objectively that the parties clearly intended property or title to the cargo to pass to JMM only upon payment of the purchase price:

(a) the mode of sale adopted by the parties whereby KSI retained the original house bills of lading and only released this upon payment; coupled with;

(b) the 'Document against Payment' mode expressly documented in the long term agreement; and

(c) the correspondence between KSI and JMM had the effect of varying the initial FOB terms expressed at the outset.

[64] Section 19 of the Sale of Goods Act 1957 provides for property to pass as intended by the parties having regard to the conduct of the parties and the circumstances of the case. Applying this provision to the factual matrix of the present case, it follows that title to the cargo was only supposed to pass to JMM upon payment of purchase price. This was secured by KSI retaining the original Sapphire Line house bills of lading. The condition of payment, being a fundamental term of the contract for the sale of goods had to be satisfied prior to property passing to the buyer. This is evident from a perusal of the correspondence between JMM and KSI as well as the testimony of KSI's witnesses which bear out this position.

[65] Finally, s 25(3) of the Sale of Goods Act 1957 is relevant. It provides as follows:

> 25 Reservation of right of disposal
>
> (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract that *the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled, in such a case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled*.
>
> (2) Where the goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.
>
> (3) *Where the seller of the goods draws on the buyer for the price and transmits the bill of exchange and bili of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.* (Emphasis added.)

[66] The equivalent section under the English Sale of Goods Act 1979, s 19, which is pari materia with s 25 of our Sale of Goods Act 1957 has been explained thus in *Carver on Bills of Lading* (Chapter 6, 3rd Ed):

> 6-053 Bills of lading to buyer's order
>
> The presumption in section 19(2) applies only where the goods are by the bill of lading deliverable to the order of the seller or his agent *it has been suggested that the*

> *presumption may be displaced by naming the buyer as consignee; but it is respectfully submitted, that where this is done, the statutory presumption simply does not arise and that a seller should not be taken to have given up his right of disposal merely because the bill is made out to the buyers order*. This submission is based on the fact that *retention even of such a bili of lading gives the seller considerable control over the goods; for the buyer Is not normally entitled to demand delivery of the goods from the carrier without presenting the bill … it is submitted that where the contract provides for payment against bill of lading the normal inference would be that the seller had reserved a right of disposal until payment in accordance with the contract had been made* … (Emphasis added.)

It would follow from the foregoing that KSI, by retaining the house bills of lading, retained a right of disposal over the goods and as such property in or title to the cargo did not pass to JMM.

[67] What then is to be made of the effect of s 1 of the Bills of Lading Act 1855? (It is applicable in Malaysia pursuant to s 5 of the Civil Law Act 1956.) Does it displace the unpaid seller's right to sue for a breach of the contract of carriage? The Sapphire Line house bills of lading remain evidence of the contract of carriage between the shipper, KSI and the carrier, Oceanmasters and Sapphire Line. This contract remains intact as do the obligations and responsibilities of each party thereunder. This position is preserved in s 2 of the Bills of Lading Act 1855, which preserves the right of the carrier to claim freight against the original shipper or owner, notwithstanding an endorsement on the III of lading. It follows that the preservation of such a burden also preserves with it the right in the shipper to sue the ship owner for breach. In any event, in the instant case there was no endorsement of the Sapphire Line house bills of lading to JMM.

[68] The purpose of the enactment of the Bills of Lading Act 1855 was explained in the English Court of Appeal case of *Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd, The Berge Sisar* [1999] QB 863:

> At common law and before the enactment of the Bills of Lading Act 1855 (18 & 19 Vict C 111) a buyer of goods was unable to sue or be sued on a contract of carriage made between the shipper and the carrier even where a document of title had been transferred to him and he thus had constructive possession of the goods. The doctrine of privity of contract stood in the way. Section 1 of the Bills of Lading Act 1855 was passed to remedy this situation. The section provided, in essence that the transfer of a bill of lading also effected the transfer of the contract of carriage …

[69] It is clear from the foregoing that the Bills of Lading Act 1855 was promulgated to supplement or meet the problems faced by a buyer of goods who was unable to sue on the contract of carriage, notwithstanding that property in the goods had passed to him. In the instant case, I have concluded on a consideration of the entirety of the facts that property in the goods did not

pass to JMM, either upon loading of the goods at Jakarta or upon discharge in Dammam. The fact that the master agreement provided for FOB terms is not conclusive, as I have explained above. The totality of the factual evidence suggests that parties only intended title to pass upon payment of the purchase price. JMM never paid the purchase price and so title never passed to it. As title to the goods did not pass to JMM, it follows that the right of suit was not thus exclusively bestowed upon JMM, to the exclusion of KSI. For these reasons I am satisfied that KSI clearly has the requisite locus standi to sue Oceanmasters and Sapphire Line for breach of contract under the Sapphire Line house bills of lading.

Issue 2: Is KSI's action time barred under article III rule 6 of the Hague Rules of the terms of the sapphire house Bill of Lading?

[70] The defendants contend that they are discharged from liability because the suit was not brought within one year after delivery of the goods/cargo. The Sapphire Line house bills of lading, which comprise the basis for KSI's claim, provide that the Hague Rules are incorporated by contract in the bill of lading. This is stated in cl 6.

[71] It should be noted that cl 6G of the Sapphire Line house bills of lading provide that the carrier is discharged from liability within nine months from the date of delivery. However as this date is shorter than that provided by the Hague Rules, it is not in dispute that the nine month time limit is not enforceable. However the defendants do rely on the 12 month time limit imposed under article III rule 6 of the Hague Rules. The said article provides as follows:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year af?? delivery of the goods or the date when the goods should have been delivered.

[72] Reference is made to the House of Lords case of *Aries Tanker Corpn v Total Transport Ltd, The Aries* [1977] 1 WLR 185 which is authority for the proposition that the failure to commence suit within the time limit stipulated not only bars the remedy sought by KSI but destroys the cause of action, such that it is extinguished:

> ... This amounts to a time bar created by contract. But f do not think that sufficient recognition to this has been given in the courts below, it is a time bar of a special kind, viz, one which extinguishes the claim (cf article 29 of the Warsaw Convention 1929) not one which, as most English statutes of limitation (eg the Limitation Act 1939, the Maritime Conventions Act 1911), and some international conventions (eg the Brussels Convention on Collisions 1910, article 7) do, bars the remedy while leaving the claim Itself in existence.
>
> ... the charterers claim, after May 1974 and before the date of the writ had not

merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any purpose into legal proceedings ...

[73] The defendants in this case submit that KSI's claim which was filed on 1 August 2013 falls outside the one year period from the date of delivery. They maintain that the cargo was released to Al-Fanar on 5 June, 23 June and 25 June 2012.

[74] KSI submits in response that the plea of a time bar extinguishing its claim is untenable for, inter alia, the following reasons:

(a) misdelivery or wrongful delivery does not, fall within the scope of the Hague Rules. Accordingly the prescribed time limit under the article III rule 6 of the Hague Rules is inapplicable;

(b) there is no evidence produced by Oceanmasters and Sapphire Line as to the precise dates of delivery of the cargo. As such, it is not possible to compute the stipulated period of one year to determine when the claim was extinguished because the date of delivery have not been identified or confirmed with any degree of precision; and

(c) time limit does not apply in relation to a fundamental breach as is the case here.

Does the misdelivery of cargo fall within the scope of the hague rules?

[75] Article III rule 6 provides that any claim against the carrier by the cargo owner must be made within one year from 'delivery' or when 'delivery' ought to have occurred. The reason given for this normally is that a carrier cannot be expected to keep records for long periods and should be able to ascertain quickly and while events remain relatively fresh, the number of claims that it may be subjected to. As stated by Lord Bingham in the English Court of Appeal in the case of *Cia Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1990] 1 Lloyd's Rep 310, the purpose of article III rule 6 '... like any time bar intended to achieve finality, ... to enable the shipowner to clear his books'.

[76] In order to succeed in establishing the time bar, thereby extinguishing KSI's claim, the defendants must establish:

(a) the cargo was carried under a contract of carriage by sea;

(b) the legal regime of the Hague Rules are operative; and

(c) the suit to establish liability under the Rules in respect of 'loss or damage to the goods' under the contract has not been brought within a year. Such

time bar runs from the time of delivery.

[77] The moot point for consideration here turns on the definition to be accorded to the word 'delivery'. Does it encompass 'misdelivery'? In other words, the issue is whether misdelivery at the port of discharge fails within the operational ambit of the Hague Rules. In other words, as at the moment of misdelivery of goods without production of the bill of lading, can it properly be said that 'discharge' was complete, such that the carrier may proceed to place reliance upon the contractual provisions of the time bar under the contract of carnage?

[78] Put another way, does the carrier's misdelivery or wrongful release of the consignment come within 'carriage of goods' as defined in the Hague Rules, thereby attracting the time bar under article III rule 6?

[79] 'Carriage of goods' under the Hague Rules covers '... the period from the time when the goods are loaded on to the time when they are discharged from the ship'.

[80] Article II sets out the scope and applicability of the rules as follows:

> Subject to the provisions of Article Vi, under every contract of carriage of goods by sea and by the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereafter set forth.

[81] These matters referred to are functions for the carrier beginning when the goods are put on board the vessel and ending when they are unladed from the vessel. A strict reading of the Hague Rules therefore suggests that they do not apply prior to 'loading' or after 'discharge'. It may therefore be argued, as KSI does, that the Hague Rules govern only the time between the goods having been hoisted on board over the ship's rail and the goods having been hoisted over the ship's rail and placed on the quay. As such, the contention put forward by cargo owners such as KSI is that the one year time bar ought not to apply to misdelivery because delivery is outside the scope of the Hague Rules.

[82] The line of authorities on this subject has been somewhat chequered over the years. However in Malaysia at least, there is binding authority dating from 1964 to the effect that the Hague Rules do not encompass 'delivery' or 'misdelivery' but cease to have effect upon 'discharge'. In *Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd* [1964] 1 MLJ 443 (FC, Singapore), Thompson LP held as follows:

> The reasoning of Devlin J is in my opinion applicable to the words 'loss or damage' in Article III Rule 6 para 3. In this paragraph these words are not qualified or limited

A by anything in article III as they are not in s 4 of the USA. Act. In my view therefore the appellants must show that, on the admitted facts and circumstances, the 'loss' arose in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods'. In my opinion they have not.

B This was a simple and clear case where the 'loss' rose in relation to the delivery of such goods. Can it be plausibly suggested that though the loss was due to the goods being delivered by the carrier to a party other than the shipper after the goods had been discharged from the ship and had been placed in storage in a godown and the next duty of the carrier under the bill of lading was to deliver the goods to the shipper, it was nonetheless a loss which arose 'in relation to the discharge of such C goods' within the meaning of article II and therefore a 'loss' within the meaning of Article III Rule 6 paragraph 3? I think not. The operation of discharge is different from the operation of delivery. If the intention and object of the Hague Rules were to also provide for the responsibilities and liabilities rights and immunities of a carrier in relation to the delivery of goods under a contract of carriage of goods by D sea to which the Hague Rules apply nothing would have been simpler than to insert the word 'delivery' after 'discharge' in article II ...

[83] Based on the foregoing reasoning of the Federal Court, it would follow that article III rule 6 of the Hague Rules does not apply to or encompass E misdelivery as the application of the rules ceases upon 'discharge' of the cargo, as opposed to delivery. In short, delivery is outside the scope of the Hague Rules. As such, they cannot apply to misdelivery of cargo. Instead the obligation to deliver is arguably under the terms of the bill of lading and not the Hague Rules.

F

[84] This however, has not been the final word on the matter over the years. The debate as to when or at what point the mandatory regime of the Hague Rules ceases to be applicable, has provided differing answers over the years. Towards the end of 1998, the English High Court in the English case of *Cia* G *Portorafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos* [1989] 2 Lloyd's Rep 63 supported the proposition that the Hague-Visby Rules (applicable there then, rather than the Hague Rules) do not apply to events after the discharge from the ocean vessel. In that case, the plaintiff carrier sought a declaration that the cargo interests claim for damages arising out of the H theft of party of the cargo (crude oil) had been extinguished by article III rule 6 of the Hague-Visby Rules on the grounds that suit was not brought within one year of the date when the cargo should have been delivered. At first instance, Hirst J concluded that 'delivery' fell outside the scope of article II and that the Hague-Visby Rules were thus inapplicable. However, the English I Court of Appeal took a differing view the following year in 1989 and reversed Hirst J's decision by holding that the Hague-Visby Rules in general and the one year time bar in article III rule 6 in particular were applicable during the time of the theft of the cargo by the carrier. Lord Bingham held that the acts of which the cargo-owners complained were clear breaches of article III Rule 2. He took

the position that it was not a case of misdelivery. Notwithstanding this, he acknowledged that the definition in article 1(e) of the Rules assigned a temporal term to the carriage of goods under the rules supporting the argument that the rules do not apply to events occurring before loading or after discharge. In that case theft of the cargo took place prior to discharge, in that the goods, ie crude oil was misappropriated in transit, it was in this context that Lord Bingham noted that characterising the theft as 'misdelivery' was not apt. On these grounds alone the decision is distinguishable as the Incident' giving rise to the loss occurred prior to discharge, when the goods were in the custody and possession of the carrier.

[85] However the approach of the English Court of Appeal in *The Captain Gregos* was followed by Kirby P in *Chellaram (P S) & Co Ltd v China Ocean Shipping Co, The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493, a decision of the Court of Appeal of New South Wales. In that case it was held, inter alia, as follows:

> ... Contrary to the opinion of Mr Justice Hirst in The Captial Gregos, article [edac20]of the Hague Rules does not in my opinion establish a category of events arising from loading to discharge, strictly so confined. It also includes custody and care, loading and handling as well as the carriage and discharge of the goods. 'Custody and care' are apt to cover events after discharge and until delivery of the goods. Any other construction would artificially terminate their effect at the ship's rail ...

[86] Learned counsel for Oceanmasters submits that the decision in *The Zhi Jiang Kou* reflects the correct view on the application of the time bar defence. Indeed, the approach in this case appears to have attracted approval in the Hong Kong Court of Appeal case of *Wily Products Co Ltd v Hecny Shipping* [1995] 3 HKC 47 (albeit by way of obiter). This was a case which involved the loss of cargo after discharge in a Brazilian port and before the cargo was delivered to the land carrier. Liu JA in the Hong Kong Court of Appeal considered Article 1(e) of the Hague Rules and concluded that the Article ought not to be strictly construed so as to limit it to events from loading to discharge. Article II he concluded would extend the period beyond discharge. As such, he concluded that the sea carriage did not terminate after discharge and the rules continued to apply at the time of the loss prior to the goods being handed over to the land carrier.

[87] However matters took a turn when in 1997 the Supreme Court of Australia held in favour of the view that completion of discharge results in the cessation or termination of the sea carriage, thereby ending the time bar provisions under the Hague-Visby regime. Phillips JA in *Anglo Irish Beef Processors International v Minister for Agriculture, Food and Forestry: C-200/94* [1997] 1 Lloyd's Rep 207 observed, inter alia, as follows:

> Next, there is the way in which the Hague Rules operate, it is plain that their operation is circumscribed ... Secondly, the rules operate only in respect of a particular period of time. By virtue of the definition in Article I, the 'carriage of goods' is limited to '... the period from the time when the goods are loaded on to the time when they are discharged from the ship'. It has been said, on that account, that the Hague Rules govern only ...' during the time between which the goods pass from 'ship's rail to ship's rail' so that loss and damage occurring either before or aner that time is altogether outside the Hague Rules ...

[88] And in 1997, the Hong Kong Court of Appeal in *Computronics International v Piff Shipping Limited* [1997] 2 HKC 53, held, obiter that the Hague-Visby Rules ceased to be applicable after discharge and before loading. In that case the plaintiff, whose business included the purchase of goods and the resale of such goods to its own customers, agreed to sell some goods to a customer at a stipulated price. The plaintiff came to an agreement with the defendant (carrier) by which the goods were to be put into a container and sent to the relevant port. The goods were so sent and arrived at the port of Hamburg when they went into the custody and control of a third party and appeared to have been released by the third party without the plaintiff's authority. The plaintiff sued the defendant. This is what the Court of Appeal observed in relation to the time bar:

> Under para 6 of art III of the Hague-Visby Rules the period is one year and the question is whether or not the goods, in Hamburg and in the possession or control of Rohde & Liesenfeld, were still within the contract of carriage. Our attention was drawn to the decision of another division of this court in *Wily Products Co Ltd v Hecny Shipping Limited* [1995] 3 HKC 47 per Liu JA. The other two members of the court proceeded on the basis that there was no relevant limitation period which could assist the defendant Liu JA, however held that 'carriage of goods' as defined in paragraph 1(e) of article I of the Rules should not be strictly construed Liu JA, relied upon a decision in the Australian case of The Zhi Jian Kou [1991] 1 Lloyd's rep 493 wherein it was observed that the words 'custody and care' are apt to include events after discharge until delivery. We are not at all convinced that that is correct. There is, in our view, a strong argument that the goods were not under a 'contract of carriage' at the time of any misdelivery ...

[89] As such, the Hong Kong Court of Appeal has disapproved *The Zhi Jiang Kou*.

[90] Given the foregoing, and more significantly the decision of the Federal Court in *Peninsular & Oriental Steam Navigation Co Ltd & Ors v Rambler Cycle Co Ltd* [1964] 1 MLJ 443, the preferable view to be adopted in relation to the interpretation of article III rule 6 of the Hague Rules is that it encompasses the contract of carnage from the point of loading until the point of discharge and does not extend to delivery. As such, it would appear that the time bar does not operate to preclude KSI's claim.

Dates of delivery of the three consignments

[91] Further or alternatively, I concur with learned counsel for KSI that it is not possible to determine with any degree of certainty, the precise dates when the three consignments were delivered into the care of Al-Fanar. This would mark the precise dates when time would begin to run. Time would not run from the date of arrival of the vessel at the Port of Dammam. The defendants sought to rely on the dates of arrival of the vessel at the port to mark the date from which time would begin to run. To complicate matters further Oceanmasters and Sapphire Line through their witnesses gave different dates of delivery of the cargo to Al-Fanar at the Port of Dammam. Oceanmasters asserted that the delivery of the cargo occurred on 5 June, 23 June and 25 June 2012 respectively. Sapphire Line alleged that the delivery of the cargo was on 7 June, 3 July and 10 July 2012 respectively.

[92] Sapphire Line's witness, D2W2, moreover confirmed in the course of cross-examination that the dates in her witness statement were not the dates of delivery of the cargo to Al-Fanar but the dates of arrival of the vessel at the Port of Dammam. She conceded that the dates of release to the recipient were different. However, she was unable to specify these dates.

[93] The witness for Oceanmasters, D1W1 admitted that Oceanmasters had no delivery order to evidence the date of delivery of the cargo to Al-Fanar. His knowledge of such dates was derived from its agent, shipping and logistics, and was to that extent, hearsay. Ultimately he conceded in the course of cross-examination that he could not specify with certainty when precisely Al-Fanar had received the cargo.

[94] Further, there are emails dated 31 July 2012 in relation to the 14th shipment which confirm that as at 31 July 2012 that particular shipment had not been delivered. Therefore it is clear that the time bar could not possibly operate in relation to the 14th shipment, even if it were applicable, as the suit by KSI was commenced on 1 August 2013.

[95] Given the lack of certainty as to date of delivery, this comprises a further and alternative basis for my conclusion that the time bar under article III rule 6 of the Hague Rules does not come into effect to extinguish KSI's claim.

Issue 3: Whether Oceanmasters (as principal) And/or Sapphire (as Agent) are in breach of contract as carrier and/or in breach of duty as bailee for reward, in releasing and/or allowing the cargo to be released without due production of the Original Sapphire House bills of lading

[96] KSI as the shipper enjoys the right to rely on the Sapphire House bill of

lading as evidence of the contract of carriage. As stated in *National Jaya (Pte) Ltd v Hong Tat Marine Shipping Pte Ltd* [1979] 2 MLJ 6 at p 8; [1978-1979] SLR 416 at p 419:

> ... the bill of lading issued by (a shipowner) and accepted by (a shipper) is evidence of the contract of carriage of goods by sea entered into by the parties.

[97] The fact that the cargo in the instant case was shipped under a house bill of lading (ie a bill of lading issued by a non-vessel owning common carrier ('NVOCC')) issued by a freight forwarder on terms that it undertakes the carriage of the goods, does not in any way detract from the nature of the house bill of lading as the contract of carriage between the freight forwarder and the shipper. It therefore follows that Oceanmasters as an NVOCC, and Sapphire Line as its agent, owe obligations to KSI as the carrier under the Sapphire Line house bills of lading.

[98] It is trite that a carrier is under a duty to deliver goods carried under a bill of lading only against the production of the original bill of lading. To deliver otherwise, either without the original bill of lading or against a 'switch' bill of lading would, prima facie amount to a breach of the contract of carriage and/or conversion. Put conversely, the shipper to whom a bill of lading is issued has a contractual right to take delivery of the goods at the port of delivery on production of the relevant bill of lading. This right arises from the issuance of the bill of lading.

[99] As stated in *The 'Cherry' and Others* [2003] 1 SLR 471 (CA): '... neither the owner of the cargo nor anyone else can insist on delivery of the cargo being made to him if he is unable to produce the bill of lading'.

[100] And in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] 1 MLJ 200 (PC, England), Lord Denning put the proposition in law thus:

> It is perfectly clear law that a shopowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was 'unto Order or his or their assigns', that is to say, to the order of the Rambler Cycle Company If they had not assigned the bili of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

[101] These sentiments were echoed in the local cases of *The 'Taveechai Marine'; Owners of cargo lately laden on board the ship or vessel 'Taveechai Marine'*

v Owners of and other persons interested in the ship or vessel 'Taveechai Marine' [1995] 1 MLJ 413.

[102] The failure to deliver against production of the original bill of lading also amounts to a breach of the contract of bailment (see *Barclays Bank Ltd v Customs and Excise Comrs* [1963] 1 Lloyd's Rep 81).

[103] In the instant case, the bill of lading is a straight bill of lading in that it was consigned specifically to JMM. Additionally the shipment was on an FOB basis, whereby the seller's obligations ceased upon loading of the cargo beyond the ship's rail. The fact that it is a straight bill of lading means that the carrier, ie Oceanmasters and its agent, Sapphire Line were under a contractual obligation to deliver the goods at Dammam on production of the straight bill of lading. This proposition is borne out by the Singapore Court of Appeal decision in *APL Co Pte Ltd v Voss Peer* [2002] 4 SLR 481 ('the APL case'). In the *APL* case, the carrier contended that under a straight bill of lading, it was required to deliver the goods to only the named consignee and no one else. It was further contended that such delivery could be made notwithstanding that the consignee did not produce the straight bill of lading. The Singapore Court of Appeal agreed with the first proposition, but not the second. Chao Hick Tin JA who delivered the judgment of the court said, inter alia, that the fact that a straight bill of lading was not transferable in the sense that its transfer did not operate as a transfer of possession of the goods, did not in itself mean that the carrier had no contractual obligation under such a bill of lading to deliver the goods only on production of the bill of lading. As such, the court found the carrier liable to the shipper for breach of the contract of carriage and also in conversion as it had delivered the goods to the named consignee without production of the straight bill of lading. This decision affirms the principle of delivery against production of the original bill of lading.

[104] The decision in the *APL* case was endorsed as being correct in the English House of Lords decision of *MacWilliam (JI) Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] 2 AC 423.

[105] In the instant case, not only were the three consignments not delivered against production of the original bills of lading, but pursuant to the provision of a second set of bills of lading for the same cargo or by the provision of 'switch' bills of lading.

[106] In determining whether the carrier, Oceanmasters and its agent Sapphire Line, acted in breach of their contractual duties as carrier it is necessary to examine the precise mode of issuance of the house bills of lading and the events that ensued thereafter.

[107] In the original Sapphire Line house bills of lading, KSI was named as 'shipper', JMM as 'Consignee' and Super Express was named as 'agent'.

[108] Master or Ocean Bills or Sea Waybills were also issued for the carriage of the goods by China Shipping Lines where Pratama was named as 'shipper', Al-Fanar as 'Consignee' and Shipping & Logistic as 'Notify Party'.

[109] Sapphire Line testified that Pratama was named as shipper in the master bills of lading to ensure that the Sapphire Line house bills of lading were properly surrendered before the cargo was delivered to Al-Fanar upon its arrival in Dammam. Super Express is Oceanmaster's agent to accept the surrender of the house bills of lading by JMM, while Shipping & Logistic is Oceanmasters agent to deliver the cargo at Dammam. As such, they enjoy apparent or ostensible authority to attend to the delivery of the cargo on behalf of Oceanmasters.

[110] After the cargo had been placed on board the vessel, Pratama forwarded to Oceanmasters information concerning the shipment which advice is descried as 'pre-alert documents'. It contained details of the Sapphire House bills of lading as well as the master ocean bills of lading issued by the vessel.

[111] Oceanmasters in turn forwarded the information to shipping and logistics, its agent at Dammam. However it instructed the release of the cargo upon receipt not of the original house bills of lading but upon receipt of the original 'switch' bills of lading. There was an undertaking to forward the 'switch' bill of lading as soon as it was available. It may be gleaned from this that Oceanmasters was well aware that the delivery of the cargo was to be made at Damma against 'switch' bills of lading and not the original Sapphire Line house bills of lading.

[112] No mention was made in the pre-alert of the Sapphire Line house bills of lading.

[113] Pursuant to this Oceanmasters did not issue any pre-alert to its agent in Dubai, Super Express, identifying the Sapphire House bills of lading to enable Super Express to ensure that these house bills of lading were surrendered in exchange for the 'switch' bills of lading.

[114] Witnesses for both Oceanmasters and Sapphire Line agreed that:

(a) 'switch' bills of lading ought only to be issued by the original carrier or its agent, ie Oceanmasters, Sapphire Line or their agent. This would enable them to control the sanctity of the Sapphire House bills of lading; and

(b) 'switch' bills of lading could only be issued upon collection of the original house bills of lading.

[115] In this context, it is not in dispute that it is negligent, if not wrongful, for a carrier to issue a second set of bills of lading in respect of the same cargo without the consent of the holder of the first set of bills of lading, ie KSI in the instant case (see *Elder Dempster Lines v Ishag, The Lycaon* [1983] 2 Lloyd's Rep 548 and *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties)* [2003] 3 SLR 611).

[116] The issuance of a second set of bills of lading to a different shipper to cover the same shipment of goods under a set of bills of lading issued earlier to the original shipper is a breach of the contract of carriage (see *The Feng Hang & Ors* [2002] 2 SLR 205).

[117] Oceanmasters however maintains that its role in these shipments is purely to arrange the carriage of the goods upon the instructions of JMM and Super Express, whom Oceanmasters maintains is JMM's agent. Oceanmasters further submits that the use of 'switch' bills to procure the release of the cargo directly to JMM's end-client, Al-Fanar does not necessarily mean that it is in breach of the contract of carriage. It submits that the use of 'switch' bills is common in the industry to protect business interests, so long as the statements in the 'switch' bill of lading are the same and are only issued upon surrender of the original bills of lading.

[118] Oceanmasters maintained through D1W1 that in so far as the 11th, 14th and 15th shipments were concerned, it was unaware that Super Express had not obtained the original Sapphire house bills of lading prior to releasing the 'switch' bills of lading. Oceanmasters points to the fact that a similar mode of release against 'switch' bills of lading was utilised for all the prior shipments with no problems whatsoever. Since the other twelve shipments went through without any issue, Oceanmasters had no reason to be put on notice that these three consignments would be any different. In short, Oceanmasters maintains that it assumed that Super Express, at the behest of JMM, had ensured the surrender of the original Sapphire Line house bills of lading prior to the issuance and use of the 'switch' bills of lading.

[119] Oceanmasters further submits that in so far as it is concerned, it was at all times the agent of the buyer, JMM in making the arrangements for the carriage of the cargo and was obliged by law to obey the instructions of its principal, JMM. It further maintains that it owed no duty of care to KSI. This last contention however lacks substance as it fails to address the issue of the effect of the Sapphire Line house bills of lading, which were issued by Oceanmasters' agent, Sapphire Line at the former's express request. The

issuance of that bill of lading resulting in the formation of a contract of carriage cannot be dismissed as simply creating no obligations on the part of Oceanmasters or its agent.

[120] In essence therefore, Oceanmasters' stance is that:

(a) the contract of sale being on an FOB basis, and it being appointed by the buyer, its primary duty and responsibility is to the buyer, JMM, rather than KSI;

(b) there is nothing wrong in the issuance of 'switch' bills of lading as this practice is commonly used in the industry to protect business interests;

(c) Oceanmasters had no knowledge that Super Express and/or JMM had failed to procure the surrender of the original Sapphire Line house bills of lading prior to issuance of the 'switch' bills. On the contrary, Oceanmasters assumed that Super Express had taken all necessary steps to ensure such surrender; and

(d) as such, it is contended that Oceanmasters is not in breach of any contractual obligation to KSI, and cannot be held responsible for the loss and damage suffered.

[121] From a consideration of the case law set out at the outset of this issue, it is clear that mercantile case law has continued to uphold the fundamental requirement that delivery of cargo is to be undertaken against the production of the original bill of lading. It makes no difference that Oceanmasters and its agent Sapphire Line are NVOCC or non-vessel owning common carriers. The certainty in this area of the law has been so for some considerable time. As Lord Mansfield said more than two centuries ago in *Vallejo v Wheeler* (1774) 1 Cowp 143 at p 153:

> In all mercantile transactions the great object should be certainty; and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

[122] In other words, if it were to be the case that the well-entrenched principle that delivery under a bill of lading is to be effected only against the production of the original bill of lading may be varied, altered or excused in FOB contracts, or where the carrier genuinely believed that 'switch' bills of lading had been properly and regularly issued, then this would give rise to considerable uncertainty in the mercantile field. It would not be clear as to precisely what circumstances would allow delivery without production of the original bill of lading.

[123] In any event, it is evident that as the Sapphire Line house bill of lading

was issued upon the direction of Oceanmasters as the NVOCC, it follows that a valid contract of carriage subsisted between Oceanmasters as principal, Sapphire Line as its agent and KSI as the shipper. This contract carried with it well entrenched obligations in relation to that very same bill of lading. Oceanmasters breached its obligations under the bill of lading by:

(a) knowingly allowing JMM and/or its agent Super Express to proceed with the issuance of 'switch' bills of lading without ascertaining whether the original Sapphire Line house bills of lading had been surrendered to JMM or Super Express;

(b) failing to enquire or ascertain from KSI whether the original Sapphire Line house bill of lading had been exchanged for the 'switch' bill; in short, failing to procure KSI's consent to the use of such 'switch' bills of delivery of the cargo; and

(c) allowing the use of 'switch' bills as opposed to the original house bills of lading for the purposes of effecting delivery of the cargo.

[124] In the instant case it is dear that not all parties to the contract of carriage, particularly KSI, had agreed to the use of 'switch' bills. More significantly, the lack of vigilance and lack of compliance with well entrenched principles relating to delivery against original bills of lading were not adhered to by Oceanmasters, resulting in JMM perpetrating and furthering its fraudulent purpose of procuring release of the cargo without payment of the purchase price. In other words, Oceanmasters facilitated (albeit unwittingly) the fraudulent scheme of JMM. On the totality of the facts and circumstances of the case, it appears to this court that Oceanmasters was in breach of its contractual obligations under the contract of carriage and also in breach of its duties of bailment.

[125] Oceanmasters' liability vis a vis KSI arises as the undisclosed principal under the Sapphire Line house bills of lading. In this context, s 179 of the Contracts Act 1950 allows KSI to seek recourse against Oceanmasters in enforcing its rights under the Sapphire Line house bills of lading. It is as if those contracts of carriage were entered into directly with Oceanmasters.

Section 179 provides as follows:

> Contracts entered into through an agent, and obligations arising from acts done by any agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Similarly, s 184 of the Contracts Act 1950 also confers upon KSI the right to proceed against Oceanmasters as the undisclosed principal.

> Rights of parties to a contract made by agent not disclosed (a) If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an gent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

[126] As such, KSI is entitled to seek recourse against Oceanmasters as undisclosed principal for the breach of its contractual obligations under the contract of carriage and in bailment.

Sapphire Line

[127] Turning to Sapphire Line, its liability arises, if at all, as the agent of Oceanmasters. However, it is the entity that issued the Sapphire Line house bill of lading to KSI. In so far as KSI was concerned, Sapphire Line was the carrier and its contract of carriage was with Sapphire Line. It was only after the loss of the cargo that KSI discovered the roie played by Oceanmasters.

[128] The basis for potential liability in law vis a vis Sapphire Line is to be found in s 186 of the Contracts Act 1950. The former section provides as follows:

> Right of person dealing with agent personally liable
>
> In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable.
>
> ILLUSTRATION
>
> A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both for the price of cotton.

[129] As such, this section affords the basis for KSI to proceed against both Oceanmasters and Sapphire Line as principal and agent concurrently. In short, it allows for both joint and several liability of the agent and principal.

[130] The issue that falls for consideration is whether on the factual matrix of this case, Sapphire Line as agent should be jointly and severally liable for its failure to ensure that delivery was against the original house bills of lading it had issued to KSI.

[131] Sapphire Line by way of defence and in denying liability, maintains that it was appointed as Oceanmasters' agent as evidenced by the agency agreement dated 2 February 2012 between them. It therefore proceeded to issue the Sapphire Line house bills of lading in respect of the carriage of cargo

from Tanjong Priok, Jakarta to Dammam, Saudi Arabia under its name, on behalf of Oceanmasters. Super Express was named as its agent, again at the behest of Oceanmasters. They were the delivery agents. Discharge was to be handled by shipping and logistics. All instructions came from Oceanmasters. The evidence led at trial bears this out.

[132] However beyond this, Sapphire Line maintains that it was entirely unaware that 'switch' bills were to be utilised in the transaction. Oceanmasters never advised Sapphire Line (or Pratama) that 'switch' bills would be utilised in this transaction. The alteration of the pre-alert details were equally unknown to Sapphire Line.

[133] Sapphire Line also points out that KSI did not advise it that the consignments remained unpaid for. Neither were they asked to withhold delivery or return the three shipments.

[134] Sapphire Line pleads complete ignorance of the release of the cargo to Al-Fanar by the use of 'unauthorised' means, namely the use of 'switch' bills of lading issued by North American Lines, all of which was orchestrated by JMM. It maintains that it only found out after the cargo had been released that the Sapphire Line house bills of lading were never presented to procure release.

[135] The defence is essentially that Sapphire Line had no part to play in the delivery or release of the cargo to Al-Fanar against the 'switch' bills of lading. It had at all times, as agent, acted solely on the instructions of Oceanmasters and could not therefore be said to have knowingly acquiesced or consented to the release of the cargo without production of the original house bills of lading.

[136] The more pertinent question is whether Sapphire Line had a duty to ensure or ascertain that delivery was only against its bills of lading. This issue turns on a consideration of the purpose for which the Sapphire Line house bill of lading was issued. In so far as KSI was concerned, the house bill of lading comprised the contract of carriage as well as a receipt for the goods. Upon receipt of the bill of lading issued by Sapphire Line, an express representation was effectively made to KSI that the bill of lading evidenced the contract of carriage. It also amounted to security in the sense that the end consignee could not take possession of the consignment save and only against presentation of the original house bill of lading.

[137] As such, the fact that Sapphire Line house bills of lading were issued to KSI representing the contract of carriage as well as securing the cargo from release save and except against production of the original bills of lading, is sufficient to warrant the imposition of liability on Sapphire Line, notwithstanding that it acted at all times as agent to Oceanmasters. Its

ignorance of the use of 'switch' bills does not afford it a defence in law as against KSI.

[138] The fact that Sapphire Line had no means of knowing that a 'switch' bill transaction was taking place at the behest of JMM does not detract from the representation made to KSI.

[139] It is apparent from the evidence of D2W2 that she remained ignorant of the mode of delivery of the consignment by the use of 'switch' bills, until after the loss of the cargo. As agent to Oceanmasters, Sapphire Line was not involved directly in the delivery role. The issue of delivery was dealt with primarily by Oceanmasters and Super Express. However once again, to my mind, this fact does not detract from Sapphire Line's liability in law for joint responsibility with Oceanmasters for the breach of the contract of carriage. Given that s 186 allows for the imposition of liability on both principal and agent in a fit and proper case, it appears to this court that the circumstances of the case warrant a finding that Sapphire Line is jointly and severally liable with Oceanmasters for the loss suffered by KSI.

[140] In arriving at this conclusion, I have considered the contention that it would require some element of active participation on the part of Sapphire Line or the clear failure to comply with an express obligation to warrant the imposition of liability on it as agent. However, it would appear that the long standing principle of allowing delivery against production of the original bill of lading requires protection in law. The law in this area has been certain for some considerable time. In the event an agent is able to carve out instances when delivery against production of the original bill of lading is waived, this will dilute the legal principle and give rise to considerable uncertainty. It is important for cargo owners to be entitled to rely on this rule of custom and practice with certainty.

[141] In all these circumstances, I am satisfied that Sapphire Line as agent is jointly liable with Oceanmasters for the losses sustained by KSI.

Loss and damage suffered by KSI

[142] It is not in dispute that as a consequence of the use of the 'switch' bills and the failure to ensure delivery against the original house bills of lading, KSI suffered the loss of consignments number 11, 14 and 15. The quantum or worth of these consignments is also not in issue, as stated at the outset. It is ciear that Oceanmasters and JMM (separately under the contracts of carriage and sale respectively) are liable for these losses suffered by KSI arising from their separate breaches of the contracts of carriage and sale respectively. As stated at the outset, it is undisputed that the loss suffered by KSI stands at

USD$5,914,010.40. Accordingly it follows that Oceanmasters is liable (jointly and severally with JMM) to KSI in the sum of USD$5,914,010.40 together with interest and costs as prayed for in the statement of claim.

Issue 4: whether oceanmasters, Sapphire Line, JMM and/or super express and/or other parties conspired to iniure ksi by obtaining the release of the cargo without due production of the original Sapphire House bills of lading

[143] The elements of the tort of conspiracy are clear and do not require full repetition here (see *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393; [2010] 9 CLJ 389). It is however clear from a consideration of the totality of the evidence that there is insufficient evidence on the record to bear out the following elements:

(a) there was a combination of two and more persons to do certain acts — in this context there was no or insufficient evidence of any plan or concerted joint effort between the parties specifically to injure KSI by allowing delivery of its cargo without production of the original bills of lading;

(b) the requisite element of an 'intention' to cause such injury was also missing. This is borne out by Sapphire Line's lack of knowledge of the use of 'switch' bills. Neither was there any evidence to support the proposition that Oceanmasters had specifically collaborated with JMM to allow for JMM's fraudulent use of 'switch' bills without procuring surrender of the original bills of lading; and

(c) there was insufficient evidence to establish that the release of the goods was performed in furtherance of any such agreement.

[144] For these reasons, KSI's cause of action premised on conspiracy to injure against the defendants is dismissed.

CONCLUSION

[145] In the entirety of the circumstances, KSI has succeeded in establishing its claim against both the defendants, on a balance of probabilities and accordingly judgment in the sum of USD$5,914,010.40 with interest from 5 October 2012 is entered against Oceanmasters as prayed for in the statement of claim. KSI is also entitled to the costs of this action from Oceanmasters in the sum of RM80,000 only.

Claim allowed.

Reported by Afiq Mohamad